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RECENT CASES

APPEAL—DIVISION OF JUDGES—AFFIRMANCE.—CLARK v. WABASH RY. CO., 109 N. W. 309 (IOWA).—*Held*, that on appeal, if the State Supreme Court is equally divided, the ruling of the lower court is affirmed by operation of law.

The judgment will be affirmed or exceptions over-ruled when the Appellate Court is divided in opinion, *Etting v. United States Bank*, 24 U. S. 59; *Clark v. Kean*, 1 Del. Ch. 144; otherwise the majority opinion rules, *Beaulieu v. Furst*, 2 La. Ann. 46; and it matters not if such is reached by different reasoning. *Oakley v. Aspinwall*, 8 N. Y. Sup. 1. It follows that when the Court of Appeals is equally divided in opinion as to part of the decree appealed from, it must be affirmed as to so much; and if they concur or a majority of them concur, that there is error in the residue, so much of it must be reversed. *Commonwealth v. Beaumarchais*, 3 Call. 122 (Va.). But in the National Supreme Court, if on a constitutional question, a majority is required to pronounce a judgment, *Briscoe v. Commonwealth Bank*, 33 U. S. 118; as to jurisdiction, if equal division, the jurisdiction is sustained and the case is decided on its merits. *State v. Hays*, 30 W. Va. 107; *contra*, if in U. S. Supreme Court, *Coleman v. Hudson River Bridge Co.*, *Fed. Cas.*, No. 2983. When one judge is disqualified or cannot sit in a cause, and the other two are divided, the decision below is affirmed, *Tex. & P. Ry. Co. v. Gentrey*, 13 U. S. App. 531; *contra*, no judgment can be rendered, *Bowman v. Flower*, 5 Mart. (La.) 407. But when such opinion is divided and judgment affirmed, the court are not obliged by statutes to file their opinions as in other cases, *Fraser v. Whitley*, 2 Fla. 116; nor does it settle the law, *Bridge v. Johnson*, 5 Wend. (N. Y.) 342, *Durrett v. Rucker*, 36 Ga. 272; and a bill in equity will be dismissed, *Waddle v. U. S. Bank*, 2 Ohio 336.

CONTRACTS—ABANDONMENT—PART PERFORMANCE.—CLEVELAND, C. C. & ST. L. RY. CO. v. SCOTT, 79 NORTHEASTERN, 226 (IND.).—*Held*, that a recovery may be had for a part performance of an entire contract, though there be no cause or excuse for its abandonment, if the part performed is beneficial to the defendant.

If the servant, without legal excuse, abandon the employment before full performance of an entire contract, he cannot recover anything for his services upon the contract, *Start v. Parker*, 2 Pick. 267; for under an entire contract, full performance is a condition precedent to the right of recovery thereon, *Miller v. Goddard*, 34 Me. 104; neither can he recover on an implied contract, *Laurence v. Miller*, 86 N. Y. 131; because the special contract governs the rights of the parties in respect to what has been done under it and excludes any implied contract, *Hansell v. Erickson*, 28 Ill. 257. The same applies to the contractor in the same circumstances. *Olmstead v. Beale*, 19 Pick. 528; *Peterson v. Maher*, 46 Minn. 468; *Diefenback v. Stark*, 56 Wis. 462. Although the rule very generally prevails that one guilty of a wilful breach of an entire or special, but not general contract, is without remedy for the recovery for a part performance, yet it is not universal. The

pioneer case, *Britton v. Turner*, 6 N. H. 481, allowed a recovery upon a *quantum meruit* to the extent of benefits received, but that recovery, if any, was based at the contract price with deduction for what it would cost to procure a completion and of any damages sustained by reason of the breach and this case has since been followed by a very few states, *Pixler v. Nichols*, 8 Iowa 106; *Wheatly v. Miscal*, 5 Ind. 142; *Duncan v. Baker*, 21 Kan. 107. Those cases rested on two reasons: First, that a plaintiff should be allowed to recover, notwithstanding a wilful breach, for the reason that when he was sued by the defendant, the defendant might not be able to recover more than nominal damages, and in such a case, to refuse the plaintiff a right of action, would be to give substantial damages to the defendant. Second, that the understanding of the community, in such a case, is that a laborer shall receive compensation for the services actually rendered by him, but this understanding rests not on the contract itself but only upon the obligation imposed by law. *Parcell v. McCumber*, 11 Neb. 209; *Chambler v. Baker*, 95 N. C. 98; *Carroll v. Welch*, 26 Tex. 147.

CONTRACTS—MASTER AND SERVANT—WRONGFUL DISCHARGE—*DANIEL V. MANHATTAN LIFE INS. CO.*, 102 N. Y. SUPP. 27. A contract of employment stipulated that either party might terminate it by a notice of thirty days. Thereafter, the contract was extended for a year from a specified date. Similar renewals were subsequently made, the last renewal extending the contract for a year after a specified date. *Held*, that the master was liable for discharging the employee before the expiration of the year. *Jenks, J., dissenting.*

A new contract may abrogate an earlier one, either expressly or by implication. *Evans v. Jacobitz*, 67 Kan. 249; *Sutton v. Griebel*, 118 Ia. 78. To effect discharge by implication, however, the new contract must be clearly inconsistent with the earlier contract. *Drown v. Forrest*, 63 Vt. 557; *Pease v. McQuillin*, 180 Mass. 135. If the later contract covers the same subject and has the same scope, but is wholly or partially inconsistent therewith, it abrogates the earlier contract *in toto*. *Tuggles v. Callison*, 143 Mo. 527; *Spreckel v. Bander*, 30 Or. 577. But if the subject-matter is only in part the same, the latter contract supersedes and abrogates, only in so far as it is inconsistent with the earlier one. *Alferitz v. Ingalls*, 83 Fed. 964; *Bray v. Loomer*, 61 Conn. 456. A modification which merely extends the time for performance, leaves the remaining provisions in full force. *Underwood v. Wolf*, 131 Ill. 425. The minority opinion in this case is supported in *Blondel v. Le Vesconte*, 41 Minn. 35, holding that after a contract of service for no definite period had been partly performed, a subsequent written agreement fixing a definite term, embodies the terms of the prior contract.

CORPORATIONS—TRANSFER OF ASSETS—VALIDITY AS TO CREDITORS.—*WARD V. CITY TRUST CO. OF NEW YORK*, 102 N. Y. SUPP. 50. A trust company loaned money to the owners of the capital stock of a corporation, taking their note therefor, with the stock as security. Thereafter, the control of the corporation affairs was given to one of the stockholders who, in the name of the corporation, as president and general manager, indorsed a draft drawn to the order of the corporation, to the trust company who accepted this as payment of the loan and surrendered the note and stock. *Held*, that the title of the trust company to the draft could not be attacked on the ground that the payment thereof rendered the corporation insolvent, where the company